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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - - Petitioner

versus

JAMES H. BROWN III - - - - - Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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[redacted]

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The petitioner prays that a writ of certiorari issue to review the appellate order of the United States Court of Appeals for the Sixth Circuit rendered October 31, 1980.

THE QUESTION PRESENTED FOR REVIEW

Did Dismissal by the Supreme Court of Kentucky of Respondent's State-Court Appeal, Pursuant to Procedural Rule Which Operated Upon His Appellate Counsel's Default, Violate Any Part of the Constitution of the United States of America?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of the case before this Court.

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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - *Petitioner*

v.

JAMES H. BROWN III - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER, WITH APPENDIX

REFERENCE TO OPINIONS

Decision herein by the United States Court of Appeals for the Sixth Circuit was by a three-paragraph order of October 31, 1980, entered the same date, and styled James H. Brown III v. Steve Smith, Superintendent, Kentucky State Reformatory, No. 79-3589. The order refers for affirmance to that court's decision rendered the same day in Cleaver v. Bordenkircher, —— F. 2d —— (6th Cir. 1980, No. 79-3514). These reports may be found at Appendix 27, 28-33. The order and judgment of the United States District Court for the Eastern District of Kentucky, reviewed on appeal to the Court of Appeals, were filed June 25, 1979, entered June 27, 1979, and may be found at Appendix

34-36. The magistrate's memorandum opinion of September 5, 1978, and his report and recommendation of September 25, 1978, which were adopted in full by the District Court order above set forth, may be found at Appendix 37-43.

STATEMENT OF JURISDICTION

The filing and entry date of the appellate order of the United States Court of Appeals for the Sixth Circuit of which review is sought in this Court is October 31, 1980. The appellate order resulted from a civil appeal from a habeas corpus proceeding in the District Court.

No rehearing was sought by any party.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate order in question by 28 U.S.C. § 1254(1).

This Court should grant the writ of certiorari under the authority of Rules 17.1(a) and (c) of this Court.

Rule 17.1(a). The Sixth Circuit has decided a federal question in a way in conflict with the Supreme Court of Kentucky, a court of last resort, thereby casting doubt on the Kentucky court's Constitutional ability to dismiss Kentucky appeals based upon appellate counsel's procedural default. In so doing, the federal court of appeals has so departed from this Court's opinion authority regarding state-court appeals, and from its rule authority, and from its principles of comity and federalism as to call for this Court's supervision to resolve and restore its Constitutional authority.

Rule 17.1(c). The Sixth Circuit has decided a nationally important question involving state-court power over state-court appeals procedures in a way in direct conflict with *McKane* v. *Durston,* 153 U. S. 684 (1894), *Ross* v. *Moffitt,* 417 U. S. 600 (1974), and *Francis* v. *Henderson,* 425 U. S. 536 (1976), and the principles embodied in Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Circuit Courts. This Court should settle such challenge to its authority and to the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that there is no Constitutional authority to justify the result of the courts below. Such absence of authority involves reference to

The Sixth Amendment, Constitution of the United States

The Tenth Amendment, Constitution of the United States

The Fourteenth Amendment, Constitution of the United States

Rules 16.1 and 33.7, Supreme Court of the United States

Rule 31(c), Federal Rules of Appellate Procedure.

The full text of this authority is set forth at Appendix, pp. 45-48.

STATEMENT OF THE CASE

References herein will be to either the Joint Appendix of the parties as filed in the Court of Appeals and which presently is not before this Court (JA), or

to the Appendix of opinions and reports which accompanies this petition (A). Respondent invoked federal jurisdiction under 28 U.S.C. § 2254 in the District Court (A 38).

Respondent James H. Brown III was convicted of murder in Mason (Ky.) Circuit Court following a jury trial at which he did not testify, the final judgment of conviction coming on October 15, 1976 (JA 7). Respondent had been indicted with his brother, and the report of his brother's separate conviction and appeal may be found at *Brown* v. *Commonwealth,* Ky., 555 S. W. 2d 252 (1977) (JA 7).

Respondent timely filed a notice of appeal from his murder conviction, and the record on appeal was timely filed in the Supreme Court of Kentucky (JA 7). Thereafter, on March 16, 1977, respondent timely sought and received from the Supreme Court of Kentucky a 30-day extension of time to file his brief on appeal (JA 7). Respondent cited appellate counsel's press of work in seeking the extension (JA 8). The grant was in the form of a "FINAL EXTENSION" (JA 34). On the last timely day of that extended period, respondent did not file his appellate brief. Instead, he requested another extension of time (JA 9-10).

This last request for extra time was denied, as were subsequent motions by respondent for reconsideration (JA 14-16). On May 2, 1977, respondent tendered an 85-page brief to the Supreme Court of Kentucky (JA 12). That court dismissed respondent's appeal on October 5, 1977, in response to a motion by the Common-

wealth of Kentucky (JA 16). Respondent's appellate counsel in this period was appointed.

Respondent filed his petition for writ of habeas corpus in the United States District Court for the Eastern District of Kentucky on October 31, 1977 (JA 1). Respondent's petition claimed that he was being held unlawfully in Kentucky on two grounds. They were "denial of equal protection in prosecuting appeal guaranteed by § 115 of the Kentucky Constitution," and "denial of due process and ineffective assistance of counsel on appeal" (JA 4; A 38).

At no time in any federal court has respondent ever asserted a Constitutional deprivation at his state-court trial for murder.

The District Court found that state remedies had not been exhausted, but nevertheless held the action on its docket, and respondent reentered Mason (Ky.) Circuit Court seeking a belated appeal under (Ky.) RCr 11.42 (JA 59, 61). The relief was granted by the circuit court (JA 61).

Respondent again appealed his murder conviction to the Supreme Court of Kentucky, and this time he timely filed his appeal brief in that court (JA 62, 75). Respondent's second brief in the Supreme Court was 46 pages in length (JA 109). He did not allege prejudice by filing a much shorter brief than his first one of 85 pages, nor did he seek leave to file a longer brief.

On August 22, 1978, the Supreme Court of Kentucky, upon its own motion, again dismissed respondent's appeal (JA 73).

Respondent thereupon reentered District Court. That court's magistrate, without an evidentiary hearing, determined that a convicted state defendant has the right under the United States Constitution to effective assistance of appellate counsel on state-court appeal. The magistrate determined that the critical question was whether, due to the ineffectiveness of appellate counsel, respondent had been denied the right to an appeal under § 115 of the Kentucky Constitution. The magistrate determined that Section 115, Kentucky Constitution, provides every convicted defendant the right of appellate review of his conviction (A 37-43).

Petitioner objected to the magistrate's report, asserting that appeal under §§ 115-116 of the Kentucky Constitution is not absolute but is conditional and limited and must be taken according to mandated rules, or be lost. Petitioner objected that there is no federal due process right to effective assistance of appellate as opposed to trial counsel, and that there was no equal protection violation in regard to the dismissal of respondent's appeal.

Petitioner further objected that respondent's appellate counsel had not been shown to be ineffective, and sought an evidentiary hearing on this matter. Petitioner objected that he had no power over the Supreme Court of Kentucky and could not force that court to reinstate respondent's appeal, that respondent nowhere in District Court had ever attacked his trial conviction — as opposed to his appellate default — as violative of a Constitutional right and that since the trial judgment stood valid, with a written record

thereof, a new trial was not jurisdictionally possible. Finally, petitioner objected that it is wrong for United States courts to disallow state courts the use of their rules of appeal dismissal when those United States courts continue to have use of the same rules of appeal dismissal (JA 84-93).

On June 25, 1979, the District Court adopted in full the magistrate's report and recommendation and ordered respondent's release, on due process grounds, subject to the conditions of granting respondent either another trial or a third attempt at appeal. The District Court determined that respondent had the Constitutional right to effective assistance of appellate counsel on his Kentucky appeal, and that such right was violated when the Supreme Court of Kentucky dismissed the appeal when respondent's brief was not timely filed (A 34-36; A 37-43).

Petitioner appealed to the Sixth Circuit. On September 4, 1979 (JA 107), the District Court ordered respondent released on bail pending that appeal. In so doing, the District Court stated that it had issued the writ of habeas corpus "not because there was any finding of insufficient evidence to sustain the conviction, but because of errors of counsel, that is, the appeal (brief) was not timely filed" (JA 116).

Petitioner's appeal to the Sixth Circuit asserted that dismissal of respondent's state-court appeal, pursuant to procedural rule which operated upon his appellate counsel's default, violated no Constitutional right owing to respondent, including a right to effective assistance of appellate counsel. Petitioner also as-

serted, in any event, that respondent's appellate counsel was not ineffective, even when measured by standards applicable to trial counsel, and that at most he was chargeable only with an error of judgment.

The Sixth Circuit rendered its appellate decision on October 31, 1980 (A 27). The District Court's judgment was affirmed on the basis of the Sixth Circuit opinion in *Cleaver* v. *Bordenkircher*, ___ F. 2d ___ (6th Cir. 1980, No. 79-3514), decided the same day (A 27). The Sixth Circuit found the issue in the two cases to be identical. However, the Sixth Circuit did not set out any facts whatsoever in its decision in the present case. Nor did the Sixth Circuit address the District Court's conclusion that respondent is entitled to effective assistance of appellate counsel on state-court appeal and that appellate counsel's ineffectiveness denied him his right to state-court appeal (A 27).

The Sixth Circuit concluded its *Cleaver* opinion by stating:

> In the District Court in our present case, the District Judge relied primarily upon a due process analysis based on denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *. (A 33)

The District Court in the present case also used a due process analysis.

By order entered December 2, 1980, the Sixth Circuit stayed the mandate in the present case, pending application for writ of certiorari in this Court (A 44).

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

Dismissal by the Supreme Court of Kentucky of Respondent's State-Court Appeal, Pursuant to Procedural Rule Which Operated Upon His Appellate Counsel's Default, Violated No Part of the Constitution of the United States of America.

The Constitutional question which this Court should accept and resolve is whether state courts may dismiss appeals from state criminal convictions, based upon defaults of procedural rules by appellate counsel. In Kentucky, such dismissal is approved by the Commonwealth's Constitution, by procedural rule, and by decision of the Supreme Court of Kentucky.

United States habeas corpus courts below, however, have determined that such dismissal by the Supreme Court of Kentucky violates the Constitution of the United States, even though federal appellate courts themselves may dismiss appeals in their own jurisdiction under the same and similar circumstances without violating the Constitution. Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Federal Rules of Appellate Procedure.[1]

A subsidiary question is whether state-court appellants are entitled to effective assistance of *appellate* counsel, as they are to *trial* counsel, after the trial ends following felony conviction, and jurisdiction leaves the trial court and attaches in the appellate court. That is,

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[1]It appears, *infra* at p. 20, that the United States Court of Appeals for the Sixth Circuit, by indirection, is asking this Court to review its opinion.

trial is Constitutionally fundamental, but is state-court appeal also Constitutionally fundamental?

These questions are critically important to the Constitutional functioning of Kentucky's appellate courts and appellate procedures, and to the Constitutional administration of justice in Kentucky, as well as to all state courts. Numerous cases of this nature presently are being litigated in the Kentucky courts and in federal habeas corpus courts on review. Without exception, the federal courts have determined that Constitutional error occurred when Kentucky's appellate courts dismissed appeals from criminal convictions, based upon failure to follow procedural rules. This is so even though, by tradition and law, such dismissal of appeals in Kentucky heretofore has been accepted as appropriate, proper and lawful. Certainly, the above-cited federal rules of dismissal clearly announce that dismissal of appeals by United States courts does not offend the Constitution. Otherwise, this Court could not countenance their existence.

Under the authority of *McKane* v. *Durston,* 153 U. S. 684, at 687-688 (1894), state-court appeal is not a due process requirement of the Constitution:

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.
>
> * * *
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon

> such terms as in its wisdom may be deemed proper. * * * [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Thus, Kentucky need have no appeal procedure whatsoever, as a matter of federal Constitutional law, the matter of appeal apparently having been reserved by the states unto themselves, Tenth Amendment, United States Constitution.

Through §§ 115-116 of its Constitution, Kentucky has created a system of limited and conditional appeal. That is, appeal may be taken only by following certain authorized rules of procedure. If those rules are not followed by all who would appeal, the appeal may be dismissed. The promulgation and enforcement of such procedural rules prevents chaos on appeal, enhances orderly and effective proceedings, and in fact provides all citizens with the equal protection of law. *Williams* v. *Payne,* Ky., 515 S. W. 2d 618, 619 (1974).

That appeal in Kentucky is not absolute is confirmed by (Ky.) CR 76.34(6), which provides that appeals may be dismissed in their entirety; by *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978), which approved dismissal of a direct appeal from a murder conviction; as well as by the twice dismissal by the Supreme Court of Kentucky of respondent's state appeal.

It is clear then, that Kentucky has created a conditional and limited system of appeal as approved by *McKane, supra.*

However, both the Sixth Circuit and the District Court erroneously concluded that in Kentucky appeal is absolute. Based upon that erroneous analysis of Kentucky law, both courts then proceeded to erect thereon an error of federal Constitutional law.

In so doing they did not address the reality, that if dismissal of appeals by federal courts based upon appellate counsel's procedural default is Constitutional, then so also must it be for state courts. It would be odd indeed for federal courts to impose Constitutional limitations upon state courts which they do not impose upon themselves. *Ross* v. *Moffitt,* 417 U. S. 600, at 617-618 (1974).

These federal rules buttress petitioner's argument. The violation of these rules which leads to their operation may be occasioned by the acts or omissions of appellate counsel. If violation of these rules automatically points to ineffective assistance by appellate counsel, or deprivation of appellate counsel, on Constitutional grounds, this Court could not countenance their existence and their enforcement would be worse than useless.

These federal rules are a practical application in federal jurisdiction of the logic expressed in *McKane, supra,* and in *Moffitt, supra* and *infra,* that there is no Constitutional due process right to a state criminal appeal or any of its parts. Since criminal appeals in federal law were unknown prior to 1889, *Carroll* v. *United States,* 354 U. S. 394, 400-401, n. 9 (1957), it is seen that no substantive or fundamental due process right to appeal arises from the Constitution. Logically

and historically, therefore, there can be no Sixth Amendment right to effective assistance of *appellate* counsel. The Constitutional right to effective assistance of *trial* counsel is derived from the Sixth Amendment, *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir., 1974), which is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). The Sixth Amendment applies only to *trial* counsel and does not apply to *appellate* counsel.

Appeals and appellate counsel were unknown to federal law when the Sixth Amendment was adopted, and they remained unknown for another one hundred years, *Carroll, supra.* Appeal, it therefore is seen, is not a fundamental and independent Constitutional right to protect life, liberty or property. Such protection occurs at trial, and the failure of appellate counsel to timely file a brief on appeal does not offend the Sixth Amendment. Whatever happens in appellate court is not governed by due process standards which apply at trial. Those fundamental trial standards simply cease to exist when appeal commences, *McKane, supra,* and *Moffitt, supra* and *infra.*

Thus, the *McKane* law that appeals may be limited and conditioned upon procedural rules prevails in United States law in just the same manner as it prevails in Kentucky law. That is, counsel's acts or omissions on appeal simply do not offend the Constitution as a matter of due process, *Moffitt, supra* and *infra,* and respondent is without any federal remedy as regards his state-court appellate default. Of course, any

allegation of violation of a Constitutional right at state *trial* could be vindicated by resort to habeas corpus in federal court. Interestingly, respondent in all the time he has spent in federal courts has *never* alleged in federal court that his state *trial* resulted in denial of a Constitutional right.

That being the case, petitioner submits that there can be no Constitutional right to effective assistance of *appellate* counsel on appeal, at least as such assistance applies to trial counsel in the fundamental arena of the trial court. After all, what default by appellate counsel can be worse than that default which leads to dismissal of the entire appeal? *McKane, supra.*

The reason there is no Constitutional right to state appeal, or to prohibition of dismissal of appeal, or to effective assistance of appellate counsel, is articulated in *Moffitt, supra,* at 610-611, as follows.

Trial is fundamental. Appeal is not fundamental. A state trial court may not dispense with trial without the consent of the criminal defendant. A state appellate court, however, may dispense with appeal without the appellant's consent. Appeal, therefore, is no part of trial. Trial and appeal are significantly different and accomplish different things.

Accordingly, at some point the trial must end and the appeal, if any, begin. So do the duties of trial counsel end and the different aspects of appellate counsel representation begin. Kentucky law marking this point of change, *Hoy* v. *Newburg Homes, Inc.,* Ky., 325 S. W. 2d 301, 302 (1959) is binding upon federal courts, because any grant or privilege of state appeal

is not a matter of fundamental due process under the Constitution.

The creation of appeal for criminal defendants, as well as the conditions of its taking, is entirely dependent upon the wisdom of state law, *McKane, supra.* That is, whether any appeal exists in any form at all in Kentucky is entirely a Kentucky consideration and states may attach such conditions and limitations to appeal as they alone see fit, without offending due process. *McKane, supra.* Since the assistance of appellate counsel is ancillary to the non-fundamental grant of state appeal, assistance of appellate counsel can rise to no greater due process status that the appeal itself.

Sections 115-116 of the Kentucky Constitution and the rules promulgated thereunder are entirely consistent with due process requirements. Respondent under the United States Constitution not being entitled to an appeal at all in Kentucky, except for the Kentucky Constitutional procedure granting one under conditions and limits, thus has no federal entitlement beyond what §§ 115-116 provide.

Therefore, dismissal of a state-court appeal does not offend the Constitution on due process grounds. Conceptually, for a person in respondent's present position, the right of appeal simply does not exist as a matter of state law. Thus a right of state appeal does not exist as a matter of Constitutional law.

And equal protection considerations, which must be made on a case-by-case factual basis, cannot elevate an appellate to an exalted position so that he may dis-

regard state procedural requirements which all who would appeal must follow, as will be seen, *infra.*

Moffitt, supra, is important in another regard. It represents the first apparent attempt by this Court to come to grips with a generation of imprecise and ambiguous opinions which it has written in the area of state-court appeal. Those opinions begin with *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and *Douglas* v. *California,* 372 U. S. 353 (1963).

This *Griffin-Douglas* line of opinions, without ever identifying and explaining the Constitutional source of the asserted appeal right, tends to raise for the first time the idea that there may be a Fourteenth Amendment due process right under the Constitution to effective assistance of counsel on state-court appeal, and that it somehow may be buttressed by equal protection.

Moffitt, at 608-609, takes particular notice of this imprecise analysis and unidentified source of the asserted Constitutional right to state-court appeal, as expressed in this Court's *Griffin-Douglas* line of opinions:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. *Neither Clause by itself provides an entirely satisfactory basis for the result reached,* each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual

> dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. (Emphasis added).

Petitioner submits that the *Griffin-Douglas* line of cases does not stand for the proposition that there is a due process right to effective assistance of appellate counsel, as opposed to trial counsel, on state-court appeal. To do so would be to overrule *McKane, supra,* and its continuing vitality is explicitly confirmed by *Moffitt, supra,* at p. 606.

Moffitt is the most direct examination made by this Court in the area of due process rights, if any, on state-court appeal, and clearly questions the Constitutional basis and reach of this Court's *Griffin-Douglas* line of statements on the matter. *Moffitt,* then, is seen as the first step taken by this Court to limiting the *Griffin-Douglas* sway, and adhering to the clear teaching of *McKane,* as regards state appeals procedures.

The Sixth Circuit, in upholding the *result* of the District Court in its *Cleaver* opinion, upon which its decision herein was based, did so by a different method. The Sixth Circuit declared that dismissal of a state-court appeal was an equal protection violation, and alternatively a due process violation. Yet the Sixth Circuit in the present case of Brown set out no facts whatsoever to show an equal protection violation (A 27). Therefore, the Sixth Circuit opinion cannot stand unless there is a due process right to state-court appeal, as the District Court found.

Facts which were before the Sixth Circuit in the present case indicate that, if appellate counsel was overworked, as that court found to be the case in *Cleaver,* it was because of the exercise of appellate counsel's own independent judgment. The appeals brief he late-tendered and which led to the first dismissal of the appeal was 85 pages in length. The brief he tendered in his belated attempt at appeal was only 46 pages in length. In reducing the size of his brief by almost one-half, there was no allegation by appellate counsel or by respondent of prejudice through smaller size. Thus, it appears that doing almost double the amount of research and work for the first defaulting brief was unnecessary. This assumes, too, that the 46-page brief itself was not overly long. The responsive brief for the Commonwealth of Kentucky, on shorter paper, was only 34 pages in length, including its own facts and including authority on a point which respondent's appellate counsel said he could not find and which he invited the Commonwealth to find and present to the Supreme Court of Kentucky (JA 113-114).

Furthermore, the direct claim of deprivation made by respondent in his habeas corpus petition was not that he had been deprived of appellate counsel, as the Sixth Circuit found in its *Cleaver* decision, but that appellate counsel's assistance instead was ineffective. His only direct equal protection claim within that petition was that the Supreme Court of Kentucky dismissed his appeal, which he thought was absolutely guaranteed by *Kentucky* law. His secondary claims

of overwork were made in a memorandum accompanying his petition.

Further, the record does not show without dispute in this case that respondent was denied counsel to process his appeal while other persons in Kentucky who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by Kentucky's highest court. Petitioner specifically denied this by asserting that respondent was in no way singled out for loss of his appeal, and that all appellants in Kentucky must follow these rules or lose their appeal (JA 85).

The case of *Lucey* v. *Seabold,* No. 79-3752, was argued before the Sixth Circuit at the same time the present case and *Cleaver* were argued. The appellate counsel who defaulted in *Lucey,* leading to dismissal of the Kentucky appeal, was *retained.* As of this writing, no decision has been rendered by the Sixth Circuit in *Lucey.* Nor was the District Court impressed with the secondary claims of appellate counsel's workload. Far from finding appellate counsel overworked, the District Court thought it just as likely that respondent's appellate counsel simply made "a tacit decision to ignore a plain directive of the Kentucky Supreme Court" (A 42). The District Court also invited respondent's appellate counsel, who had continued to represent respondent in federal court, to reconsider that continued representation on grounds of incongruity and conflict of interest (A 42). Petitioner also sought an evidentiary hearing on claims of ineffectiveness in the District Court (JA 92), and at oral argu-

ment in the Sixth Circuit noted that this could include an examination into claims of workload.

The Sixth Circuit concluded its opinion in *Cleaver* v. *Bordenkircher,* No. 79-3514, upon which decision in the present case was legally based, with this remarkable assertion of its own Constitutional uncertainty about what it had just done:

> In the District Court in our present case, the District Judge relied primarily upon a *due process* analysis based upon denial of counsel. In the event the largely *equal protection* rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *. (Emphasis added) (A 33).

Inasmuch as the District Court decision in the present case also was based upon due process, the same uncertainty must exist here.

It is clear that the Sixth Circuit was uncertain about whether to justify its opinion upon due process or upon equal protection grounds. It also is clear that nowhere did that court identify and explain the source of the purported Constitutional right it proclaimed. It appears, in fact, that the Sixth Circuit may be asking this Court to resolve the matter. This is because only this Court has the power to find that an equal protection rationale is inadequate to sustain the writ of habeas corpus. Thus, it is to this Court that the Sixth Circuit's fear of reversal of its equal protection opinion had to be addressed.

The only assertable Constitutional requirement regarding appeal, based upon equal protection considerations, is that the state treat everyone substantially the same as regards appeals.

Here, respondent nowhere alleged that he was singled out to arbitrarily cut off his appeal or that Kentucky's rules are other than neutral on their face. There has been no showing that Kentucky left the appeal door open for more affluent persons who did not follow its rules, nor do the facts of record so indicate. And, of course, in the present case, the Sixth Circuit set forth no facts showing an equal protection implication.

Equal protection prohibits discrimination which is either invidious or without a rational basis, or discrimination that is based upon race, creed, color or similar suspect classification. Equal protection means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Mallett* v. *North Carolina,* 181 U. S. 589, 598 (1901).

The Constitutional right to appellate counsel, to the extent it may exist, arises from the Equal Protection Clause of the Fourteenth Amendment, *Anders* v. *California,* 386 U. S. 738 (1967). The protection afforded to an appellant is strictly limited by the ambit of the equal protection clause, *Moffitt, supra.* Accordingly, unless the procedural default in failing to timely file the brief on appeal was occasioned by invidious discrimination against an appellant, the limited equal

protection right of *Anders, supra,* is not violated. Further, unless the procedural default was occasioned by the creation by the state of an unfair advantage for itself, no right of *Moffitt, supra,* is violated.

There is no showing that the procedural default on direct state appeal was occasioned here by unfair advantage. Kentucky's system of appeal is rational and is neutral on its face and in its application. All persons are treated fairly and equally under Kentucky's system of appeal which, in the first place, is not itself a requirement of the Constitution. Any appeal would have been dismissed under the procedural default which occurred here.

In this regard, petitioner reiterates that this Court in *Moffitt, supra,* has taken the first step in dealing with the Constitutional haziness which may have led to the Sixth Circuit opinion, and which also tries to implicate fundamental due process standards for the first time.

An exaggeration may be useful to highlight the character of the Sixth Circuit opinion. What that court did was to base its decision upon the brightness of high noon, but if that turns out to be an insufficient basis, then to justify it upon the darkness of deepest midnight.

Such uncertain justification is no basis for declaring Constitutional imperatives which have profound effect upon state-court appeal procedures, especially where this Court has declared without reservation that states need have no appeals procedures whatsoever, or that if they do, they may tailor and condition them as they alone see fit.

The Sixth Circuit has violated this Court's authority in *McKane, supra,* and *Moffitt, supra,* as well as that which is embodied in Rules 16.1 and 33.7 of this Court and 31(c) of the Circuit Courts. Further, it has violated the principles of comity and federalism which this Court has so strongly announced in such opinions as *Francis* v. *Henderson,* 425 U. S. 536 (1976), and its respect for state procedures, as in *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). This strong policy of federalism and respect applies even when proceedings in the fundamental *trial* arena are at issue.

In turning from the teachings of this Court, the Sixth Circuit has created untenable and unconstitutional problems for the appeals process in Kentucky and in the other states.

The question presented here is of plenary national importance, because it implicates state appellate procedures in the entire United States. That is, if Kentucky courts cannot dismiss appeals under state Constitutional authority, based upon acts or omissions of appellate counsel, then neither can the courts of any other state.[2]

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[2]The Fourteenth Amendment protects liberty and property interests without apparent distinction. To say that a state court cannot dismiss a *criminal* appeal because of appellate counsel's procedural default is to say that state courts similarly cannot dismiss *civil* appeals based upon appellate counsel's procedural default. The leisure time used by John Locke, and later the Founding Fathers, to think their great thoughts of liberty which underlie our republic would have been impossible without property rights and the accumulation of means sufficient to support their leisure and their great thoughts. Liberty and property interests, to this extent as least, are intertwined.

While this inability to dismiss appeals exists in the courts of Kentucky and of the other states, everyone involved will know absolutely that federal courts still allow themselves to dismiss appeals without offense to the Constitution. Everyone will understand the Orwellian observation, that while all court rules and procedures are equal, some court rules and procedures are more equal than others.

CONCLUSION

Petitioner submits that this is a question of plenary national importance which should be accepted for resolution under the authority of this Court's Rules 17.1(a) and (c).

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Counsel of Record
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4044
Counsel for Petitioner

PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Mr. Jack Emory Farley, Mr. Kevin Michael McNally, Ms. M. Gail Robinson, Office of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, counsel for respondent, and that all parties required to be served have been served, all on this January 26, 1981.

J. Gerald Henry

Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3589

JAMES H. BROWN III, - - - *Petitioner-Appellee,*

v.

STEVE SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, LAGRANGE, KENTUCKY (In lieu of Richard L. Hinton, Judge, Mason Circuit Court, Maysville, Kentucky), - - - - - *Respondent-Appellant.*

ORDER (Entered October 31, 1980)

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

On receipt and consideration of an appeal in the above-styled case; and

On consideration thereof finding that the issue presented is identical with that decided this date in *Cleaver* v. *Bordenkircher*, ____ F 2d ____ (6th Cir. 1980) (No. 79-3514, decided October 31, 1980).

Now, therefore, the judgment of the District Court is affirmed for the reasons set forth in the *Cleaver* opinion.

Entered by order of the court

(s) John P. Hehman,
Clerk

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No. 79-3514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE H. CLEAVER,
Petitioner-Appellee,

v.

DONALD E. BORDENKIRCHER,
Superintendent, Kentucky State Penitentiary,
Respondent-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed October 31, 1980
(Entered October 31, 1980)

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

EDWARDS, Chief Judge. Respondent warden appeals from an order of the United States District Court for the Eastern District of Kentucky granting appellee Cleaver's petition for a writ of habeas corpus.

The facts show that Cleaver had been convicted in a Kentucky State Court on an indictment charging murder and robbery in the first degree. He was sentenced to life imprisonment. His counsel at trial was a court-appointed public defender who filed the appropriate notice of appeal in timely fashion.

After repeated extensions to allow for the filing of the record on appeal, the public defender was faced with a 40-day limitation on the filing of his appellate brief. Detailing

the work in other cases assigned to him which he had to accomplish during the time span involved, Cleaver's counsel sought a 30-day extension which the Supreme Court granted "as a final extension." At the end of that 30 days, and on the date when the appellate brief was required to be filed, the same counsel filed a motion requesting an additional 30-day extension, giving as reasons the following:

> During the next ten (10) days, the undersigned counsel has seven (7) appellate briefs which are scheduled to be filed with this Court and the Court of Appeals. In an attempt to complete as many of these pleadings as possible, the undersigned counsel has been forced to devote a majority of his available time to completing other cases to the detriment of appellant's appeal. The requested additional time is required to allow the undersigned counsel to devote the time to appellant's case which is necessarily required by its complexity and length.

The public defender's motion continued:

> Under *Anders* v. *California*, 386 U. S. 738, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1975), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from

> the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

The Kentucky Court of Appeals denied this motion for an additional extension. It also dismissed the appeal. When counsel went back to the trial court and sought and received an order reinstating the appeal, the Supreme Court held a hearing and decided that the trial court had no authority to readjudicate a procedural issue already decided by the highest court of the state. It again dismissed the appeal.

While there is no doubt as to the validity of this last ruling, the net result of the entire procedure is that the record shows, without dispute, that appellee Cleaver was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by the highest court in the state.

The District Judge who issued this writ did so on the basis of his view that appellant had been denied the effective assistance of counsel, relying in part upon *Douglas* v. *California,* 372 U. S. 353 (1963), and *Anders* v. *California,* 386 U. S. 739 (1967), and distinguishing *Ross* v. *Moffitt,* 417 U. S. 600 (1974).

Petitioner Cleaver, of course, has no federal constitutional right to appeal his state court conviction. *McKane* v. *Durston,* 153 U. S. 684 (1894). He has, however, a state constitutional right of appeal (Kentucky Constitution

§ 110(2)(b)[1]). This right cannot be regarded as having been vindicated by the appointment of a public defender who is so overloaded with work as to be unable to service his appeal as of right. Deprivation of counsel on this ground cannot, of course, be established merely by the public defender's assertion. Here, however, the facts alleged by the public defender concerning overload have not been disputed either in the proceedings before the State's highest court or in the briefing and argument in this federal habeas proceeding.

We recognize that the Attorney General does claim that "there is no proof that the state withheld adequate funds or staff to process indigent appeals." The record in this case is, however, proof to the contrary of this assertion and the same may be said of the record currently before us in *Brown* v. *Smith*, ____ F. 2d ____ (6th Cir. 1980) (No. 79-3589), wherein a similar habeas writ has been granted on similar facts by another United States District Judge.

The Attorney General also asserts, "The proper procedure would have been to request the assignment of additional personnel to handle the increased caseload." We do not, however, think that proving where the budget-making processes or personnel assignment procedures of the Commonwealth of Kentucky broke down is an appropriate burden to place upon an indigent habeas petitioner or his counsel. The state-appointed counsel for this defendant has stated that he could not perform his responsibility to perfect appellant's appeal because of an excessive workload. This assertion, if untrue, could have been contested,

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[1] "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules." Kentucky Constitution § 110(2)(b).

but was not. It stands undenied on this record. An affluent defendant who sought to retain an overburdened lawyer could and would have hired another. This petitioner was denied equal protection of the law by being denied the right to appeal which Kentucky granted to others by its Constitution.

On this record we must conclude (and do) that the reason the public defender was delinquent in observing the time limitations facing him in processing this appeal was an overload of other appellate work before the Supreme Court of Kentucky, and that this overload rendered observance of the time limitation in this case impossible.

We recognize Kentucky's right to decide, in the first instance, any disputed issue of fact concerning representations of work overload by counsel supplied by the State. If inaccurate claims are tendered, Kentucky can take measures to discipline any lawyer found to be untruthful in such representations, or willfully or negligently delinquent. We believe, however, that the facts upon which we rely in this case are undisputed. As a result of them petitioner has been deprived of the right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation. In *Ross* v. *Moffitt,* 417 U. S. 600 (1974), the Supreme Court said:

> The cases encompassed a variety of circumstances but all had a common theme. * * *
>
> [They] stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. *Ross* v. *Moffitt, supra* at 606-07.

In *Ross* v. *Moffitt, supra,* the opinion of the Court also observed that the entitlement to appellate counsel (where the state grants an absolute right to appeal) implicates

both the equal protection clause and the due process clause. *Id.* at 608-09.[2]

In the District Court in our present case, the District Judge relied primarily upon a due process analysis based on denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge and dated May 29, 1979.

The judgment of the District Court is affirmed.

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[2]The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Proces Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and th individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding section. Ross 1 *Moffitt*, supra at 608-09. (footnote omitted).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN, III - - - - - *Petitioner,*

v.

RICHARD L. HINTON - - - - - *Respondent.*

ORDER (Entered June 27, 1979)

The Court having read the record in this case, including the Magistrate's Report and recommendation filed September 25, 1978, and the objections of the respondent thereto, it is hereby

ORDERED AS FOLLOWS:

1. The Magistrate's Memorandum Opinion of September 5, 1978, and Report and Recommendation filed September 25, 1978, be and are adopted in full by this Court. This Court was of the opinion to adopt the Magistrate's Report and Recommendation before it read the learned and well-reasoned decision of its distinguished colleague, Judge H. David Hermansdorfer, in *Cleaver* v. *Bordenkircher,* Pikeville Civil No. 78-204, E.D. Ky., May 30, 1979, and that decision only reinforces that belief that a writ should issue.

2. The application for writ of habeas corpus be and is granted and a writ be and is issued, but it is stayed for a period of sixty (60) days from the date of this Order so that the petitioner's appeal to the Kentucky Supreme

Court may be reinstated, or if the appeal is not reinstated, the conviction is set aside and petitioner is granted a new trial.

3. The petitioner's motion to enlarge him on bond pending determination of the issues presented in his application for a writ of habeas corpus is rendered moot by this Judgment and is hereby overruled.

4. The motions by the respondent to hold the matter in abeyance pending the examination of pleadings from *Cleaver* v. *Bordenkircher* be and are overruled as moot.

This 25 day of June, 1979.

(s) Eugene E. Siler, Jr., Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN, III - - - - - - *Petitioner,*

v.

RICHARD L. HINTON - - - - - - *Respondent.*

JUDGMENT (Entered June 27, 1979)

In accordance with the Order of even date, it is hereby ORDERED AND ADJUDGED AS FOLLOWS:

1. Petitioner be and is granted judgment against the respondent.

2. The petition for a writ of habeas corpus be and is granted, but this ORDER be and is stayed for a period of sixty (60) days from the date of this Judgment.

3. If, at the end of sixty (60) days, no reinstatement of petitioner's appeal has been effected, the writ shall issue upon motion by the petitioner.

This 25 day of June, 1979.

(s) Eugene E. Siler, Jr., Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN, III, - - - - - *Petitioner,*

v.

RICHARD L. HINTON, JUDGE
Mason Circuit Court
Maysville, Kentucky - - - - *Respondent.*

MEMORANDUM OPINION AND ORDER—

Filed September 5, 1978
(Entered September 7, 1978)

James H. Brown III was convicted of the offense of murder by a jury of the Mason Circuit Court. Final judgment was entered on October 15, 1976, and the next day petitioner filed his notice of appeal as required by R Cr 12.52 and 12.54, Kentucky Rules of Criminal Procedure. Petitioner then timely filed the record on appeal, R Cr 12.56 and 12.58, but requested an extension of time in which to file his appellate brief. He was granted the requested extension and was so notified by letter dated March 30, 1977. The body of that letter reads as follows:

> "Appellant's motion for an extension of time to and including April 15, 1977 in which to file his brief has been GRANTED by this Court AS A FINAL EXTENSION TO AND INCLUDING APRIL 15, 1977 FOR FILING."

On April 15, 1977, petitioner's court appointed counsel sought another extension, but this time the request was denied on May 18, 1977. Repeated efforts by petitioner's counsel to obtain leave to file his belated brief proved fruitless. Petitioner's appeal was dismissed and his conviction affirmed by the Kentucky Supreme Court on October 5, 1977.

On October 31, 1977, petitioner brought this action seeking habeas corpus relief under 28 U.S.C. §2254, alleging that he was denied his right of appeal under Section 115 of the Kentucky Constitution and his right to effective assistance of counsel on appeal. Pursuant to Local Rule 4, and Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, 20 U.S.C. fol. §2254, the undersigned conducted a preliminary review of the petition. Thereafter, upon a determination that petitioner had failed to exhaust state remedies available to him under R Cr 11.42, I recommended, on November 7, 1977, that the relief sought by petitioner be denied until he exhausted his available state post-conviction remedies. Record No. 4. After considering, but rejecting, petitioner's particularized objections to my Report and Recommendation, Record No. 7, this Court per Judge Siler adopted the same as the basis for its finding that petitioner had failed to exhaust his state remedies. Record No. 8. The matter was retained on this Court's docket pending petitioner's efforts to obtain state court relief. *Id.*

Petitioner endeavored to obtain relief through R Cr 11.42 proceedings instituted in the trial court. On March 17, 1978, apparently relying on *Blankenship* v. *Commonwealth,* Ky. App., 554 S. W. 2d 898 (1977), the trial judge (who incidentally is the named respondent herein) granted petitioner a "belated appeal" from the previously entered judgment of conviction. However, on August 22, 1978, the Kentucky Supreme Court *sua sponte* dismissed petitioner's

appeal for the reasons set out in *Cleaver* v. *Commonwealth*, Ky., ____ S.W. 2d ____ (Decided July 3, 1978).

There is no question, at least in my mind, that petitioner has now exhausted his state post-conviction remedies. I base this conclusion not only on petitioner's good faith attempt to secure a belated appeal through R Cr 11.42 proceedings, but also upon the tacit admission by the Kentucky Supreme Court that, as in *Cleaver, supra,* petitioner's claim that he was denied the effective assistance of counsel was considered prior to the dismissal of his first appeal. Thus, it is now time to address the merits of the petitioner's averments.

As noted above, the critical question is whether, due to the ineffectiveness of appointed counsel, petitioner has been denied his right to an appeal under Section 115 of the Kentucky Constitution. To begin, the United States Court of Appeals for the Sixth Circuit has held that, when appellate counsel through inadvertence, oversight, neglect or press of other business fails to timely protect and perfect his client's right of appeal, then such counsel has not acted in a manner expected of a competent criminal lawyer. *Boyd* v. *Cowan*, 519 F. 2d 182 (6th Cir. 1975) *(Boyd II); Boyd* v. *Cowan*, 494 F. 2d 338 (6th Cir. 1974) *(Boyd I); Woodall* v. *Neil*, 444 F. 2d 92 (6th Cir. 1971); *Goodwin* v. *Cardwell*, 432 F. 2d 521 (6th Cir. 1970); *Newman* v. *Black*, Covington Civil Action No. 76-78 (E.D. Ky. Decided April 13, 1977). Moveover, even though the Federal Constitution contains no express requirement for appellate review of criminal convictions, *see e.g., Ross* v. *Moffitt*, 417 U. S. 600, 611 (1974); *Ortwein* v. *Schwab*, 410 U. S. 656, 660 (1973), if such review is provided, that review cannot be forfeited by a critical error of appointed counsel without abridging the Due Process Clause of the Fourteenth Amendment. *Boyd II, supra; Newman, supra.*

Accordingly,

IT IS ORDERED herein as follows:

(1) That a copy of this Memorandum Opinion and Order be served by certified mail upon petitioner's counsel, respondent and respondent's counsel — the Attorney General of Kentucky.

(2) That respondent within ten days of the date of such service shall show cause why I should not recommend that a writ of habeas corpus issue unless petitioner be granted within a reasonable time, review of his trial as if on an original appeal, *see Boyd II, supra* at 184; *Tipton* v. *Commonwealth,* Ky., 456 S. W. 2d 681 (1970), or a new trial.

This the 5th day of September, 1978.

(s) Joseph M. Hood
United States Magistrate

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN III - - - - - *Petitioner*

v.

RICHARD L. HINTON, Judge - - - *Respondent*

MAGISTRATE'S REPORT AND RECOMMENDATION—
Filed September 25, 1978
(Entered September 27, 1978)

Section 115 of the Kentucky Constitution provides every convicted defendant with a right of appellate review of his conviction. Given this right, the Fourteenth Amendment to the United States Constitution requires that an indigent be provided, *inter alia,* with counsel to assist him in perfecting that appeal. *Griffin* v. *Illinois,* 351 U. S. 12 (1956). Furthermore, it follows, *a fortiori,* that such counsel must provide his client with effective assistance on appeal. *Boyd* v. *Cowan,* 519 F. 2d 182 (6th Cir. 1975) (Boyd II); *Boyd* v. *Cowan,* 494 F. 2d 338 (6th Cir. 1974) (Boyd I); *Woodall* v. *Neil,* 444 F. 2d 92 (6th Cir. 1971); *Goodwin* v. *Cardwell,* 432 F. 2d 521 (6th Cir. 1970); *Newman* v. *Black,* Covington Civil Action No. 76-78 (E.D. Ky. Decided April 13, 1977) (Siler, J.).

From the facts previously presented to the Court, Record No. 4, it is clear that petitioner's appellate counsel,[1] Jack Emory Farley, Esq. and Kevin Michael McNally, Esq. failed to heed an unambiguous directive of the Kentucky Supreme Court requiring them to file petitioner's appellate brief no later than April 15, 1977. As a result of that failure, petitioner's appeal was dismissed and his murder conviction was affirmed.[2]

As directed, Record Nos. 7 and 8, petitioner has now presented his claim that his attorneys' failure to perfect his right of appeal constituted a denial of effective assistance of counsel on appeal to the Kentucky courts. Those

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[1]At trial petitioner was represented by Robert Gallenstein, Esq. Mr. Gallenstein, however, did not represent petitioner on appeal for some reason not explained in the record. In any event, none of the acts of omission charged herein are attributed to Mr. Gallenstein.

Petitioner is represented here by the same attorneys who by their own admission, failed to perfect his appeal. I must concede that these attorneys have been tenacious in their attempts to correct their error whether that error be the product of overwork, as was alleged in their motions for extensions of time below, or a tacit decision to ignore a plain directive of the Kentucky Supreme Court. In either case, it seems incongruous and perhaps a conflict of interest that they are now engaged in a matter where they could conceivably be called as witnesses. Counsel should explore their position in light of these unsolicited comments above.

[2]Respondent advances the attractive and acknowledged argument that state procedural rules should be given great deference. *See Wainwright* v. *Sykes* 433 U. S. 72 (1977); *Brown* v. *Commonwealth*, Ky., 551 S. W. 2d 557 (1977). Should a failure by counsel to adhere to those rules necessarily result in the denial of appellate review of a conviction? That is the dilemma which must be resolved. It is suggested that sanctions could be imposed on counsel in lieu of penalizing the client for the actions of appointed counsel. *See Blankenship* v. *Commonwealth*, Ky., 554 S. W. 2d 898, 902 (1977).

efforts were to no avail as the Kentucky Supreme Court, *sua sponte,* dismissed his belated appeal for the reasons set out in *Cleaver* v. *Commonwealth,* Ky., ____ S. W. 2d ____ (Decided July 3, 1978). Although fruitless, it must be said that petitioner's efforts in the state courts exhausted those state court remedies available to him. *Cf. Smith* v. *Digmon,* ____ U. S. ____, 22 Cr L 4150 (January 18, 1978).

Accordingly, it is recommended that a conditional writ of habeas corpus issue. Petitioner should be released from all custody attributable to the proceedings in the Mason Circuit Court unless respondent vacates the judgment of conviction entered on October 15, 1976 and reinstates that judgment by resentencing petitioner, the procedure approved by the Kentucky Court of Appeals (now Supreme Court) in *Hammershoy* v. *Commonwealth,* Ky., 398 S. W. 2d 883 (1966). *See also Stinett* v. *Commonwealth,* Ky., 446 S. W. 2d 292 (1969); *Tipton* v. *Commonwealth,* Ky., 456 S. W. 2d 681 (1970); *Prater* v. *Commonwealth,* Ky., 476 S. W. 2d 833 (1972); *Blankenship* v. *Commonwealth,* Ky. App., 554 S. W. 2d 898 (1977); *Self* v. *United States,* 574 F. 2d 363, 366 (6th Cir. 1978). If the Commonwealth is incapable of providing petitioner with a direct appeal from his conviction upon resentencing that conviction should be set aside and petitioner granted a new trial.

The parties shall file their particularized objections to this Report and Recommendation within ten days of the date of service of the same. 28 U.S.C. §636(b)(1).

This the 25th day of September, 1978.

(s) Joseph M. Hood
United States Magistrate

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3589

JAMES H. BROWN, III - - - *Petitioner-Appellee*

v.

STEVE SMITH, Superintendent of Kentucky State Reformatory at LaGrange, Kentucky - - - - - - *Respondent-Appellant*

ORDER STAYING MANDATE—Entered December 2, 1980

BEFORE: EDWARDS, Chief Circuit Judge, ENGEL and JONES, Circuit Judges.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certioari is hereby granted and the mandate is stayed for seventy-five days from this date; provided that, if within such seventy-five days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied within such seventy-five days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

THE CONSTITUTION OF THE UNITED STATES

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * * * *

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * * * * *

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing in-

surrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * * * *

SUPREME COURT OF THE UNITED STATES

RULE 16.1

1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause repends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

* * * * * * *

RULE 33.7

7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

* * * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE
RULE 31(c)

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

* * * * * * *